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91-1512

NO. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1991

RODNEY D. ROUSH, Petitioner

vs.

JUDITH ANNETTE ROUSH, BETTY WICKLINE, The STATE OF WEST VIRGINIA, Acting Through Its DEPARTMENT OF HUMAN SERVICES, and RHONE-POULENC AG COMPANY, a Pennsylvania corporation, Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Larry L. Skeen
SKEEN and SKEEN
216 W. Main Street
P. O. Box 66
Ripley, West Virginia 25271
(304) 372-3061

Brief Printing Specialist, 1001 E. Main Street, Suite 210
Richmond, Virginia 23219, (804) 644-0700

Questions Presented

1.

WHETHER ALL OR SOME SPECIFIC PORTIONS OF THE FAMILY OBLIGATIONS ENFORCEMENT ACT ("FOEA") W. VA. CODE §48A-1-1 ET SEQ.) WHICH ESTABLISHES, AMONG OTHER THINGS, THE FAMILY LAW MASTER ("FLM") SYSTEM PROVIDING FOR APPOINTMENT AND SERVICE OF LAWYERS NOT JUDGES AS HEARING OFFICERS IN ALL WEST VIRGINIA DOMESTIC RELATIONS LITIGATION WHOSE SALARIES ARE PAID IN GREAT PART BY THE WEST VIRGINIA DEPARTMENT OF HUMAN SERVICES ("DHS") WHOSE REPRESENTATIVES ROUTINELY APPEAR BEFORE FLMS REPRESENTING ONE SIDE, IS UNCONSTITUTIONAL AND VOID AS VIOLATIVE OF THE UNITED STATES AND WEST VIRGINIA CONSTITUTIONAL REQUIREMENTS OF DUE PROCESS, THE WEST VIRGINIA CONSTITUTIONAL REQUIREMENT OF SEPARATION OF POWERS BETWEEN THE EXECUTIVE AND JUDICIAL BRANCHES OF GOVERNMENT AND IS AN UNCONSTITUTIONAL INCURSION OF THE EXECUTIVE INTO THE JUDICIARY RESULTING IN THE DENIAL OF QUALIFIED, INDEPENDENT ELECTED JUDGES HEARING DOMESTIC RELATIONS MATTERS IN WEST VIRGINIA.

2.

WHETHER DUE PROCESS CONSTITUTIONAL GUARANTEES APPLY AND ENURE TO OBLIGORS SUCH AS PETITIONER WHO ARE INVOLVED IN INVOLUNTARY WAGE WITHHOLDING PROCEDURES (BOTH PREJUDGMENT AND POST JUDGMENT) UNDER THE FOEA SO AS TO REQUIRE A RIGHT OF HEARING AND AN ORDER FROM A STATE CIRCUIT JUDGE (NOT A FLM) AS A PREREQUISITE TO THE ISSUANCE OF WAGE WITHHOLDING DIRECTIVES UPON AN OBLIGOR'S EMPLOYER? AS A COROLLARY ISSUE WHETHER A RESULTANT "TEMPORARY ORDER" OR "RECOMMENDED ORDER" ISSUED BY A WEST VIRGINIA FLM, NOT A JUDGE, IS A SUFFICIENT CONSTITUTIONAL BASIS FOR COMPULSORY WITHHOLDING OF SUCH OBLIGOR'S WAGES.

3.

WHETHER THE WAGE WITHHOLDING DIRECTIVES AS ISSUED BY THE DHS AND SERVED UPON PETITIONER AND HIS EMPLOYER DENY PROCEDURAL DUE PROCESS IN THAT THEY FAIL TO PROVIDE CLEAR ADVICE TO THE OBLIGOR AND THE EMPLOYER OF THE OBLIGOR'S RIGHTS AND EXEMPTIONS UNDER THE WAGE WITHHOLDING PROCEDURES AS WELL AS WRITTEN ADVICE OF THE LIMITATIONS AND MAXIMUM AMOUNTS WHICH CAN LAWFULLY BE WITHHELD FROM THE OBLIGOR'S WAGES.

4.

WHETHER, IF TRUE AND PROVEN TO THE SATISFACTION OF A JURY OR THE DISTRICT COURT, ANY OR ALL OF THE RESPONDENTS' ACTS AS ALLEGED IN PETITIONER'S DISTRICT COURT COMPLAINT MIGHT HAVE VIOLATED PETITIONER'S CONSTITUTIONAL RIGHTS AND MIGHT HAVE ENTITLED HIM TO INJUNCTIVE RELIEF AND/OR MONETARY DAMAGES AGAINST ONE OR MORE OF THE RESPONDENTS UNDER THE CIVIL RIGHTS ACT.

Designation of Parties

Rodney D. Roush, Appellant
Larry L. Skeen, Attorney for Appellant
216 W. Main Street
P. O. Box 66
Ripley, West Virginia 25271-0066
Telephone: (304) 372-3061

Judith Annette Roush, Appellee
Ann L. Haight, Attorney for
Judith Annette Roush
Post Office Box 2931
Charleston, West Virginia
Telephone: (304) 345-8900

Betty Wickline and State of West
Virginia, Acting Through Its
Department of Human Services, Appellees
W. Randolph Fife and
Daniel R. Schuda
Attorneys for Betty Wickline and State
of West Virginia, Acting Through Its
Department of Human Services
P. O. Box 1588
Charleston, West Virginia 25326
Telephone: (304) 342-2191

Rhone-Poulenc AG Company, Appellee
Michael B. Victorson and
Christopher B. Power, Attorneys
for Rhone-Poulenc AG Company
P. O. Box 1791
Charleston, West Virginia 25326
Telephone: (304) 344-5800

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States.

Rodney D. Roush, the petitioner herein, prays that a writ of certiorari issue to

review the December 18, 1991 judgment of the United States Court of Appeals for the Fourth Circuit entered January 10, 1992, confirming an earlier judgment of the United States District Court for the Southern District of West Virginia at Charleston made and entered April 18, 1991.

Opinions Below

The opinion of the District Court is reported at 767 F.Supp. 1351 and the later confirming opinion of the Fourth Circuit is not reported. Both are printed in the Appendix hereto, infra, at pages 1 and 9 respectively.

Jurisdiction

A timely petition seeking Writ of Certiorari was filed with the Clerk of this Court to the Fourth Circuit judgment as required by Rule 13, and the jurisdiction of

this Court is invoked under 42 U.S.C. §1981, 1983 and Rule 10,1.(c) in that it is believed the Fourth Circuit Court of Appeals has decided an important question of federal civil rights and Constitutional law which decision is or may be in conflict with applicable decisions of other circuits and the decisions of this Court.

Constitutional Provisions and Statutes Involved

U.S. Const. Amend. V.

U.S. Const. Amend. XIV § 1.

W.Va. Const. Art. VIII, §6.

W.Va. Const. Art. VIII, §7.

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W.Va. Code §48A-4-1(e)

W.Va. Code §48A-4-3(b)

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W.Va. Code §48A-5-3(d)(13)

W.Va. Code §48A-5-3(d)(14)

15 U.S.C. §1673(c)

15 U.S.C. §1693m(g)

42 U.S.C. §§1981, 1983 et seq.

Statement

In 1986 only months after encouraging her husband, Rodney Roush ("Petitioner"), to adopt her son John who was born of a previous marriage, respondent Judith Roush ("Exspouse") initiated a divorce action against Petitioner in the Circuit Court of Kanawha County, West Virginia (C.A. No. 86-C-2783). Among other things her divorce complaint requested alimony for herself and support for both her son and a daughter, Melissa, born to the parties.

West Virginia domestic relations procedures established under the FOEA (W. Va Code §48A-1-1 et seq.) which was enacted and

became effective somewhere around the middle of 1986 provide that family law masters (FLMs) appointed by the Governor whose salaries are paid by the West Virginia Department of Human Services (DHS), as supplemented by fees generated from statutory charges to the litigants, rather than circuit judges, hear all divorce and domestic relation matters. This Act changed existing law which previously had Circuit Judges hear such matters, but under previous law and in some circuits where utilized, Special Commissioners appointed by judges took evidence and made recommendations to the judges. Such recommendations, however, had no effect as court orders.

Under the new system FLMs have authority to enter default orders when a party fails to appear and to issue "temporary

orders" as to alimony, child support, custody, etc., which are binding unless reversed or revised on review by a circuit court (W. Va. Code §48A-4-3(b). All other FLM acts under this system (including final divorce decrees) are only "recommended orders", not binding or effective unless both parties waive objection thereto or until reviewed and confirmed by the Circuit Court (W. Va. Code §48A-4-4).

There was apparently some confusion as to whether a Special Commissioner or FLM should hear the Roush case as it was initially referred to a Special Commissioner who held a temporary hearing and on August 7, 1986 recommended custody of both children to the mother with support of $150.00 per month per child and $300 per month to the wife as temporary alimony. A temporary

order was later entered on September 29, 1986 by the Circuit Court implementing same. After having fallen behind regarding alimony due to being laid off a "Recommended Order" was later entered February 11, 1987 by Kanawha County FLM Steager finding petitioner in arrears $925.00 as to alimony, recommending judgment against him for that sum and that in addition to the previous $300 per month, he pay another $100.00 per month until he was again current. Petitioner objected and excepted to this ruling requesting Circuit Court review which never occurred.

A divorce decree was entered January 27, 1988 adopting the same child support as before but increasing alimony from $300.00 to $400.00 per month based upon the FLM's recommendations. Petitioner appealed this

decision to the West Virginia Supreme Court on several bases including the fact he had later discovered his wife was not yet divorced from her prior husband (the decree had not been entered) when she married him, and that appeal was not resolved until July 26, 1990, long after respondents began wage withholding against him.

As the result of another FLM hearing before FLM another "recommended order" issued February 16, 1988 finding petitioner was still behind $880.00 regarding alimony. Also at this hearing it was noted petitioner's adopted son had left his Ex-spouse returning to North Carolina to live with his natural father. Because of this Petitioner moved the FLM to be relieved of the $150.00 per month in child support to his Ex-spouse, and the FLM "recommended" a

reduction in his son's support from $150.00 to $50.00 per month but also recommending that Petitioner establish a special savings account in his adopted son's name depositing the $100.00 per month into such account. This Petitioner did although he objected and excepted to such recommendation taking the matter to the Circuit Court as provided by statute before such recommendations can become effective as an order. Neither the temporary order, the divorce decree nor either of the recommended orders mentioned above authorized, recommended or authorized wage withholding against Petitioner and there were never any other orders entered regarding such subject before withholding commenced.

Nevertheless, on March 22, 1988 a wage withholding notice and directive (D.C.

Complaint Exhibit 1, App. p. 143) was issued by respondent Betty Wickline ("Wickline"), an employee of the W. Va. DHS, which was mailed to Petitioner and his employer, respondent Rhone-Poulenc AG Company ("Employer") notifying them that wage withholding was being initiated. The notice provided that $700.00 per month was to be withheld from his wages, composed of $300.00 per month in child support for the two children and $400.00 per month for alimony. The notice also indicated an additional 10% of petitioner's wages was to be withheld and applied to a then alleged alimony arrearage of $400.00. The notice indicated this would all occur unless Petitioner requested a hearing before the DHS on such matter within 14 days, and if such hearing was requested it would occur on April 6, 1988 at 9:00 a.m.

at the DHS offices. The notice further indicated as the law required, an FLM hearing had been scheduled at 9:00 a.m. April 7, 1988, the following day, to effectuate such intended withholding if petitioner did not accede.

Petitioner did object requesting a hearing and he appeared before Wickline at the DHS offices April 6, 1988 raising facts adduced at the earlier February 11th and February 16th FLM hearings that: his ex-spouse was no longer keeping his adopted son, then seventeen, who had gone to live with his natural father, he was being excused from the $150 per month child support for such son by the FLM paying only $50 per month but depositing $100 a month into a savings account as directed and that he would be objecting to any withholding for

the son for these reasons at the FLM hearing the next day.

> "(13) That if the meeting with the children's advocate fails to resolve the issues being contested, a hearing before the family law master will be held at a time and place set forth in the notice, and that following such hearing, the master will make a **recommended decision to the circuit court;** and (14) **That a recommended decision as to withholding will become effective when it is confirmed and an order is entered by the circuit court, and that if the obligor disagrees with the master's recommended decision, he or she will be given the opportunity to make objections known to the circuit court**".

W. Va. Code §48A-5-3(d)(13). [Emphasis added].

Petitioner's evidence apparently fell on deaf ears as he was advised the DHS intended to proceed with the withholding against his wages in the indicated amounts. Next day Petitioner appeared at the FLM's office with his attorney Joseph Zak but no one appeared for the DHS or for his Ex-

spouse. As a consequence no hearing was held and no withholding order was ever issued. FLM Steager then called the DHS in petitioner's presence and that of his counsel and discussed the matter and the DHS's failure to appear (See Zak affidavit D.C. Complaint Exhibit 2, App. p. 149).

Nevertheless, despite no hearing and of no supporting court order, Wickline and the DHS issued a withholding directive to Petitioner's Employer (D.C. Complaint Exhibit 1, App. p. 143), and Petitioner's wages have been withheld since that time except for one very short period when the Circuit Court ordered it discontinued (that order was later vacated by a writ of prohibition filed by the Ex-spouse with the West Virginia Supreme Court of Appeals on other grounds). According to Wickline's deposi-

tion it is the general practice of the DHS after holding an office conference with obligors to decide internally (as they did regarding Petitioner) whether there is a sufficient mistake of fact or some other reason justifying withdrawal of the proposed withholding or a change in the amount thereof, and if they decide there is no such basis they simply bypass the scheduled FLM hearing, the recommended order and judicial review thereof as provided by the statute proceeding directly with wage withholding on obligors' employers. This is a truly amazing revelation in view of the W. Va. statute quoted above which would, if FLMs were circuit judges, arguably afford substantial due process as required by the Fifth and Fourteenth Amendments and by the CCPA [15 U.S.C. §1673(c)], as the FOEA specifically requires

such hearings, resulting orders and judicial review thereof if requested as a prerequisite to the withholding of an obligor's wages.

Under the wage withholding initiated as above described Petitioner's Employer has been withholding various amounts from Petitioner's wages over the past three years. In some weeks, as Exhibit No. 5 to Petitioner's District Court Complaint (App. p. 159) demonstrates, there has been as much as 75% of Petitioner's net weekly wages withheld by the Employer which is then paid over to the DHS and eventually to petitioner's Ex-spouse.

Over the eight months that followed Petitioner, through the involuntary withholding of his wages, was overpaying child support in an amount of $100.00 per month

thus totalling $800.00. Moreover, for a number of months after Petitioner's adopted son reached eighteen DHS/Wickline still continued to withhold for the son's support until they eventually responded to Petitioner's repeated written advice and demands. They finally reduced the amount to be suggested by $150.00 per month to a total of $550.00 per month plus ten percent toward a nonexisting arrearage long since covered by the $800 overcharge. Petitioner was never refunded any of this money.

Regarding Petitioner's duty of support for his daughter of $150.00 per month, she moved from her mother's custody in August of 1988 and thereafter resided with her father until April 11, 1989 when she was taken from his home by his Ex-spouse. Throughout that period the withholding of Petitioner's wages

for his daughter's support continued unabated despite continued notices from him that he now had her custody. Petitioner was therefore entitled to an additional credit against child support of $150.00 per month for the eight months his daughter lived with him ($1,200.00) which with the $800.00 mentioned above totalled $2,000.00 in overpayments. This credit was finally recognized at later hearings by FLM Tantlinger and Circuit Judge Hey, and in fact Michele Grinberg, the Ex-spouse's legal counsel, even stipulated that as of a hearing on July 27, 1989 before Judge Hey Petitioner had overpaid her as of that time. Despite all of this the withholding of Petitioner's wages continued, including an extra 10% for a non-existent arrearage.

Petitioner moved the Circuit Court at

a July 27, 1989 hearing to terminate further withholding of his wages which was granted (See D.C. Complaint Exhibit 4, App. p. 153).

Shortly after the above order was entered Petitioner's Ex-spouse filed a petition with the West Virginia Supreme Court of Appeals seeking a writ of prohibition to block certain portions of that order and a later order that had effected another change of custody of the daughter back to petitioner due to the ex-spouse's failure to comply with the previous order. The petition which did not raise any issue about the propriety of the judge's discontinuance of wage withholding was granted and the W. Va. Supreme Court later ruled in favor of Petitioner's ex-spouse granting the prohibition against Circuit Judge Hey, but not on the wage withholding issue. As a conse-

quence after only a very brief cessation in withholding, withholding was reinstated (again without any hearing) and it has continued unabated to the present.

September 25, 1990 Petitioner filed his federal Complaint in the Southern District at Charleston, W. Va. charging unconstitutionality of the FLM statutes, lack of due process in the procedures being employed against him, civil rights violations and excessive wage withholding by his Employer. Petitioner's Employer and Petitioner's Ex-spouse filed motions to dismiss the complaint and Wickline and the DHS filed answers. Discovery depositions of Wickline and the Ex-spouse were taken and after briefing the motions to dismiss but without any hearing the District Court (Judge Haden) granted such motions dismissing the suit by

order entered the 18th day of April, 1991, even as to Wickline and the DHS who had filed no motions to dismiss. An appeal was then taken to the Fourth Circuit.

The appeal was heard and the District Court's decision was upheld on December 18, 1991 despite language that could be construed as an implicit recognition in its opinion (App. p. 1) that Petitioner had been wronged.

Since the federal suit was filed Petitioner has been granted custody of his daughter, Melissa, and respondents have ceased to withhold any further monies attributable to her child support, but they continue alimony withholding of $92.31 per week although Petitioner is not in arrears and is now actually owed considerable overpayments by his Ex-spouse. As of this date

Petitioner has never received back any of the overpayments taken through wage withholding.

Reasons for Granting This Writ

1.

The unconstitutionality aspect of the Family Obligations Enforcement Act (FOEA) as alleged by Petitioner in his District Court Complaint was totally ignored by District Judge Haden in his decision nor was it squarely addressed in the Fourth Circuit's later opinion. Petitioner has maintained throughout this litigation that FLMs by hearing divorce and other domestic relations matters and by entering "temporary orders" and recommending other decretal orders is acting in a thoroughly judicial capacity, and although W. Va. Code § 48A-4-1(e) states they are to be considered ". . .

officers and employees in the judicial branch of government. . .", in the very same subsection it indicates they are to be paid through the Commissioner of the Department of Human Services and the Child Advocate Office who "contract" them out to the judicial branch. It is submitted this arrangement is a facade which does not meet the constitutional test of the necessary separation of powers nor does it provide citizens with a disinterested qualified judiciary as required by the W. Va. Constitution so as to better assure impartial, independent decisions.

Take the present case, counsel for the Ex-spouse and her law firm at times while this case has been in progress, and also while the state divorce action between the parties has been in progress, have also been

acting as legal counsel for the DHS representing it in various litigation in which it has been involved. Then consider that the FLMs who have made the temporary rulings against Petitioner are paid by the same DHS who was at the very same time appearing before such FLMs through its Child Advocate representing and acting for one of the two party litigants (Ex-spouse Judith Roush in this case). Such an arrangement not only dispels any appearance of fairness or hope of propriety, but it is also highly conducive to injustice for the outsider. In fact it even smacks of star chamber litigation as FLM hearings are held in chambers. If FLMs could only make recommendations as to temporary orders rather issue temporary orders, which under our system have the same effect as a decretal order of a court, the situa-

tion might be somewhat more palatable. Unfortunately, that is not the case. The FOEA specifically provides them with such powers, but even then there would still be the problem in many cases as the FLM's salaries are paid by one of the two sides appearing before them.

Petitioner's counsel recognizes the United States Constitution does not in express terms prohibit one branch of state government from exercising powers conferred upon either of the other departments or branches, nor does the Constitution impose the separation of powers doctrine upon the states. Mayor of Philadelphia v. Educational Equality League, 415 U.S. 605, 94 S.Ct. 1323, 39 L.Ed.2d 630 (1974); May v. Supreme Court of Colorado, 374 F.Supp. 1210, aff'd. 508 F.2d 136 (10th Cir. 1974), cert. den.

422 U.S. 1008, 95 S.Ct. 2631, 45 L.Ed.2d 671. Sound constitutional law, nevertheless, recognizes that executive officers cannot exercise or usurp judicial powers or functions, United States v. Morton Salt Co., 338 U.S. 632, 70 S.Ct. 357, 94 L.Ed 401 (1950). See also Herminghaus v. Southern California Edison Co., 200 Cal. 81, 252 P. 607, cert dismd. 275 U.S. 486, 48 S.Ct. 27, 72 L.Ed. 387 (1927) holding any legislative act which clearly and manifestly exercises power properly belonging to the judicial department is unconstitutional. West Virginia jurisprudence echoes this strong tenet confirming that other branches of government cannot prevent the courts from exercising their innately judicial functions, State ex rel. Carnes v. Dadisman, 153 W. Va. 771, 782, 172 S.E.2d 561, 568 (1970), and the

legislature is without power to deprive a constitutional court of the authority bestowed upon it by the Constitution. Halltown Paperboard Co. v. C. L. Robinson Corp., 150 W. Va. 624, 628, 148 S.E. 2d 721, 724 (1966), states:

> "A constitutional court is not subject to legislative control unless specific authority is conferred upon the legislature by the Constitution."

No such constitutional authority has ever been granted to the West Virginia Legislature by the West Virginia Constitution for the creation and establishment of the FLM courts.

Looking closer at the FOEA one notes from its title it was not enacted by the Legislature solely for the purpose of creating a new domestic relations court system.

It was designed instead to get after dead beats who violate divorce and domestic relations orders, and almost as an afterthought it also created a new "judiciary" (family law masters) to assist the DHS in enforcing this grand plan, but by so doing it usurped divorce and other domestic relations matters from the hands and supervision of the West Virginia Circuit Courts which by the State Constitution have the exclusive duty as well as right to hear such matters. See W. Va. Const., Art. VIII, §6 providing that, subject to the supervisory control of the West Virginia Supreme Court of Appeals,

> "Circuit courts shall have the original and general jurisdiction of all civil cases at law where the value or amount in controversy, exclusive of interest and costs, exceeds one hundred dollars unless such value or amount is increases by the legislative; of all cases in equity; . . . "

See also Art. VIII, §7 which although recognizing that the Governor may initially appoint circuit judges where vacancies exist, nevertheless, requires that Circuit Judges be elected by the citizenry (Family Law Masters are appointed for four year terms and are then subject to reappointment). Circuit judges in West Virginia must have been admitted to practice law in the State for at least five years prior to election or appointment, presumably to help assure some experience and expertise, but there are no minimum practice requirements for FLMs (See W.Va. Code §48A-4-1). The same statute also provides judges are to be paid out of the state treasury whereas FLMs are paid primarily by the DHS (W. VA. Code §48A-2-22) through funds churned up in the cases before them. The above cited Article

VIII, §7 also provides that judges' salaries may not be diminished during their term whereas there is no restraint to changes in FLM salaries. As a consequence it is not surprising to note the salaries of FLMs ($35,000) are significantly less than those of Circuit Judges ($65,000), and FLMs, unlike judges, are not precluded from other legal work which is not in conflict with their service (W. Va. Code §48A-4-1).

It is therefore submitted the W. Va. family law master system, whether or not intended, does in fact improperly circumvent West Virginia and federal constitutional requirements of due process and robs the citizenry of an independent, competent, disinterested, knowledgeable judiciary in matters of domestic relations which judiciary, according to the State Constitution,

must be elected.

2.

It is very important to understand that, although the wage withholding law requires that an order from a circuit court, magistrate or a court of competent jurisdiction of another state must first be obtained authorizing such withholding after notice of an administrative hearing and of a FLM hearing has been provided to the obligor, nothing in that law (Code 48A-5-3) states that FLM's temporary orders likewise qualify as a basis for wage withholding directives. It is also critical to note the notice provisions of Code § 48A-5-3 fail to require that written notice of the maximum amounts that can be withheld from an obligor's wages and of the exemptions to which the obligor is by law entitled be provided to the Em-

ployer, as well as the party under a duty of support, along with the other matters of which he or she must first be made aware before wage withholding can commence. This is a critical and fatal omission to the state act in question in view of the decisions discussed below.

Petitioner's counsel understands and appreciates the distinctions previously made by this court in Lugar v. Edmondson Oil Co., 457 U.S. 922, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982), the New York Court's rationale in the Martin decision cited below and the additional constitutional safeguards which should be present in prejudgment attachment matters as opposed to the usual post judgment enforcement procedures. Counsel is also mindful of this Court's pronouncements some time ago in Endicott Johnson Corp. v.

Encyclopedia Press, Inc., 266 U.S. 285, 45 S.Ct. 61, 69 L.Ed. 288 (1924) and Griffin v. Griffin, 327 U.S. 220, 66 S.Ct. 556, 90 L.Ed. 635 (1946) for the proposition that the Fourteenth Amendment does not require that a judgment debtor be given notice and an opportunity to defend against a wage deduction proceeding to collect a debt that has been reduced to judgment. However, in the present case where the only "judgment" involved is one from an FLM, and it did not pertain to wage withholding, it is not correct to characterize such wage withholding as "post judgment relief" as the District and Fourth Circuit Courts have done for as of that time there had been no decree issuing from or approved by a circuit judge.

FLM's temporary orders can only then be described as a "bastard" procedure providing

rulings which, although effective unless and until set aside, and although displaying some aspects and vestiges of a judgment, nevertheless, do not qualify as a final reviewable order. Even assuming then arguendo the FLM system was constitutional, since FLM temporary orders are in the nature of short term temporary arrangements made by a nonjudicial arbiter, wage withholding procedures should not be based upon FLM's "temporary orders." Instead, wage withholding should be restricted only to orders issued from judges, or at least to FLM temporary orders which have been reviewed and ratified by a circuit judge as the Act appears to require.

As pointed out by the Third Circuit in Finberg v. Sullivan, 634 F.2d 50 (3rd Cir. 1980):

> "the [Endicott] Court did not consider the possibility that the garnishment might deprive the judgment debtor of exempt property."

Finberg, supra at 56,57.

As Burris v. Mahaney, 716 F.Supp. 1051, 1059 (M.D. Tenn. 1989) also indicates:

> "Since the Endicott era, federal and state legislation has created substantial limitations on what property may be garnished."

It is submitted that contrary to Endicott and Griffin there are much stronger reasons why constitutional due process hearing requirements should apply to wage withholding proceedings based upon domestic relations orders than to monetary judgments founded on contract or tort, whether they occur before or after an alimony or child support decree has been entered. Garnishment proceedings often occur years after the orders were entered which initially granted

alimony or child support, and considerable questions of evidence can thus arise (as was the case with your Petitioner) as to how much is properly due, and more recently how much of the obligor's income or assets are immune from such a seizure. Thus to allow Wickline to make this determination in house without regard to the rules of evidence and without any hearing falls woefully short of guarding a citizen's protected property rights.

It is submitted Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) and the balancing test enunciated therein should apply and control in this case, and when the correlative rights of the parties are thus examined and balanced, the result must be that Petitioner should have been entitled to a court hearing which he

was denied prior to the involuntary taking of his wages.

3.

At this juncture Petitioner raises the withholding directive implemented against him (App. p. 143). Follette v. Vitanza, 658 F.Supp. 492 (N.D.N.Y. 1987), a case decided by the same court as Martin v. Supreme Court of New York, 644 F.Supp. 1537 (N.D.N.Y. 1986) discussed below but a year later, ruled New York state's post judgment enforcement statutes and rules were unconstitutional as violating due process procedural requirements because they failed to provide notice to the judgment debtor of the limits which could be suggested from his wages under the CCPA (15 U.S.C. §1673) and because the notice employed failed to afford plain-

tiff proper written notice of other protections afforded by the same Act including the right to challenge the intended withholding.

If Follette were applied to the facts in the case at bar the situation would be almost ludicrous. The withholding directive involved did notify Petitioner of his right to challenge the withholding which he did, but when he did the DHS and Wickline simply ignored him withholding his wages anyway despite the lack of any supporting hearing or order. On the other hand as occurred to plaintiff in Follette, Petitioner and his Employer were not provided any notice of the limits on the amount of withholding which could be implemented against Petitioner nor of any amounts that were immune from withholding as the Follette Court held was re-

quired in any such legislation and in the withholding directives issued thereunder if it was to meet the test of constitutionality. Counsel submits Follette is also highly apposite for this and a number of other evident reasons. The Follette Court indicates the rationale of Lugar, Sniadach, Fuentes and other cases on prejudgment attachments should, nevertheless, be applicable and carry over to post judgment enforcement procedures:

> " . . . the rationale underlying the holdings in these cases involving prejudgment attachments applies with equal force to actions by private parties pursuant to a State's post-judgment garnishment statutes. Just as in the cases involving prejudgment garnishments, the private defendants in this case did not simply pursue collection of a debt by private means permissible under New York law but instead invoked the authority of a public official--the enforcement officer of a local court--and compelled a

> garnishee to withhold pay from a judgment debtor at the threat of incurring personal liability for monies not withheld. *See* N.Y.C.-P.L.R. § 5231(e). This case is thus distinguishable from *Flagg Bros.*, where the Supreme Court held that conduct that is merely *consistent* with a body of law, whether statutory or decisional, does not without more amount to 'state action' when 'no state process of state officials were ever involved in enforcing that body of law.' 436 U.S. at 160 n. 10, 98 S.Ct. at 1735 n. 10."

Follette, supra, at 504.

The Court is also directed to Kirby v. Sprouls, 722 F.Supp. 516 (C.D.Ill. 1989), a class action case which held the Illinois garnishment procedures (surprisingly similar to those being employed in West Virginia) were unconstitutional as denying procedural due process. That case discusses Endicott and Griffin but holds the later decision of Mathews v. Eldridge is controlling and that

the application of the Mathews analysis and balancing test to the Illinois wage garnishment procedure required the conclusion that the statute violated procedural due process:

> "Although the defendant makes an arguable point about Endicott, I find that the Supreme Court's more recent pronouncement in Mathews has eroded the Endicott decision. Additionally, the Seventh Circuit, in a substantially similar context, indicated that it would follow the majority of courts that adopt the Mathews balancing test."

Kirby v. Sprouls, supra, at 520.

It is submitted the standard applied by the Third Circuit, the Illinois District Court and by the Seventh Circuit discussed therein, the Tennessee and New York District Court is totally at odds with that presently being followed in the Fourth Circuit as the Fourth Circuit has ignored any due process rights, and for that reason this Court

should assume jurisdiction if for no other reason than to resolve the issue and thus provide uniformity in the various circuits of the land.

> "The [state] circuit court in this case, however, entered a final divorce decree before the suggestion commenced. **we decline to expand settled law.**" [Emphasis added].

Roush v. Roush, not reported, page 4. No. 91-2539 (4th Cir. 1991). (App. p. 1).

Another federal decision discussed earlier herein requiring procedural due process in wage withholdings from another circuit is here again raised for the Court's consideration. Burris v. Mahaney, supra, involved wage garnishment under Tennessee law. In speaking of this Court's 1924 decision in Endicott the Burris Tennessee federal court at page 1060 of its opinion stated:

> "Since 1924, the Supreme Court has never again specifically addressed the issue of what procedural protections must be granted to a judgment debtor whose property is being garnished or otherwise seized. However, as pointed out by a number of lower courts when dealing with post-judgment garnishments or attachments of property, due process jurisprudence has undergone substantial development since 1924. See Finberg v. Sullivan, 634 F.2d 50, 57 (3rd Cir. 1980); Follette v. Vitanza, 658 F.Supp. 492, 510, 511 (N.D.N.Y. 1987); Dreary v. Guardian Loan Co., Inc., 534 F.Supp. 1178, 1185, 1186 (S.D. N.Y. 1982); Neeley v. Century Finance Co. of America, 606 F.Supp. 1453, 1461 (D. Arizona 1985); Clay v. Edward J. Fisher, Jr., M.D., Inc., 584 F.Supp. 730, 732 (S.D. Ohio 1984).

The Court then went on to state that despite Endicott never having been overruled, the central approach to procedural process theory has long since shifted to the balancing approach set out by this Court in Mathews v. Eldridge, supra. The Fourth

Circuit has likewise failed to note or accept this shifting over to a balancing test and has also failed to note or concur with the numerous findings in other circuits of entitlement to procedural due process in post judgment garnishments and by its ruling the Fourth Circuit still appears to adhere to the 1924 Endicott rule.

It is clear from the above discussion of more recent federal decisions on point that obligors in post judgment garnishment proceedings such as Petitioner are minimally entitled to procedural due process and from comparing the procedures and language of the garnishment directives in those cases against the lack of procedure afforded Petitioner and the language of the withholding directive, West Virginia withholding procedures and written directives do not pass

muster, and this Court should find they do not afford, among other things, the necessary notice of rights and remedies and they lack both advice of maximum amounts that can be garnished and notice of the portion of the obligor's income which by law must remain immune from garnishment or other involuntary taking.

4.

Assuming arguendo when the Ex-spouse initially applied to the DHS for assistance thus initiating wage withholding procedures against her ex-husband that her motives were proper, and further assuming her request for child support for her son no longer living with her was at first excusable, her subsequent conduct shed her of any semblance or appearance of propriety. The Ex-spouse had a duty to report any overpayments she was

receiving just as social security and welfare recipients. Petitioner points out, and the evidence will confirm, the Ex-spouse was taking and keeping child support withheld at times when she did not even have the care of either one of her children. Judith Roush continued to insist upon and receive full support for her absent son taken from Petitioner's wages at the very same time she knew he was also paying support for this adopted son into the savings account he was "ordered" to establish by the FLM. Is this the conduct of an innocent actor?

Then take the situation where the daughter later went with her permission and knowledge and lived with her father for over half a year. During that period the Ex-spouse made no effort to advise the DHS of this nor to reduce or abate the ongoing wage

attachments against her ex-husband for such daughter's support. Is this likewise the conduct of an innocent actor?

Finally, take the situation when the son reached 18. Did Judith Roush advise the DHS of this? No way! That change and reduction was only accomplished by Petitioner's counsel many months later and then only after significant undeserved sums had been withheld from the Petitioner's wages and turned over to the Ex-spouse.

The above conduct is clearly that of one using and abusing established state procedures for private ends and illegal benefits, and it is this very conduct which caused the Ex-spouse Judith Roush to become a state actor thus answerable for damages in this proceeding. It is also this very conduct which draws one of the important

distinctions between Judith Roush and the ex-wife in Martin v. Supreme Court Of New York, supra, a case with somewhat familiar facts which would otherwise support the Ex-spouse's motion to dismiss had she been innocently invoking a statutorily provided mechanism for relief. One should also realize the Martin decision dealt with post judgment enforcement procedures, whereas in the case at bar we have an FLM's order where one not a judge is ruling on issues of property and affecting a citizen's property rights.

As to the culpability of Wickline and the DHS, these Respondents may not rely on the January 27, 1988 divorce decree or any of the other orders or FLM's recommended orders as a sufficient basis for their withholding against Petitioner as subsection

(14) of the FOEA (§48A-5-3[d]) requires a subsequent recommended decision specifically addressing the issue of withholding from the FLM confirmed by an order entered by the Circuit Court as to the propriety of the withholding before it can occur. This the Respondents never obtained nor sought after their bogus administrative hearing, and as recounted by Wickline in her deposition it is the practice at the DHS to bypass such hearings if they feel the withholding should proceed:

> A "Well, I told Anne Charnock that he wanted to take it before the Family Law Master and she said, 'Was there a mistake of fact,' and I went over the case.
>
> She said, 'There's no mistake of fact and there won't be a Family Law Master here, and there's no other court order signed by a judge.'

Wickline Discovery Deposition pp.14-15 (App. p. 162).

Respondent Wickline acting in total disregard of both the State and Federal law cited above, but at the same time under the color of the very laws she was disregarding, and against the advice and instructions of the FLM Steager, issued the withholding directive against Petitioner even before the April 7, 1988 FLM hearing date Petitioner was advised he was first entitled to have, notifying his employer on April 6, 1988, to initiate the withholding and of his wages. At the onset perhaps these actions might have been only negligent or a callous disregard of rights, but as of the time the Complaint was filed it had far surpassed the threshold and demarcation line of intent.

Admittedly under present law a monetary recovery is not possible against the DHS being an arm of the State. Will v. Michigan

Dep't. of State Police, 491 U.S. 58, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989). This is not to say, however, the DHS and Wickline in her official capacity are both not properly subject to prospective injunctive relief. By contravening state law (issuing a wage withholding without a hearing and order as prescribed by state law) Wickline lost the aegis of her cloak of immunity and exposed herself to personal liability in this 1983 action in which Petitioner sues her in both her personal and official capacities, for as the complaint indicates, Petitioner seeks not only monetary damages against Wickline and the DHS but also requests the Court to enjoin further state acts under the existing FOEA which clearly fails to afford procedural due process.

Last November this Court announced in

Hafer v. Melo, ___ U.S. ___, ___ S.Ct. ___, ___ L.Ed.2d ___, 60 U.S.L.W. 4001 (1991) that state officials could be sued for monetary damages in 1983 actions in their personal capacities. Due to the timing of that decision with the briefing, argument and decision of the Fourth Circuit which issued several weeks later, it is believed the Fourth Circuit failed to consider or apply that decision.

Focusing for a moment on his Employer, Petitioner does not concede, as the Fourth Circuit has found, that his Employer "is not responsible". Without the Employer's actions and complicity in withholding his wages there might possibly have been no damages as Petitioner's wages would have been intact. The Employer's actions are therefore the sine qua non without which we

would not be here. Federal case law advises that negligent deprivation of property without due process by itself can state a cause of action under 1983 (See Brewster v. Pike, 608 F.Supp. 1163 [W.D. Va. 1985], aff'd in part, rev'd in part and remanded 788 F.2d 985 [4th Cir. 1986]), and it might well be that a jury would find at least culpable negligence on the part of the Employer for its nonfeasance in failing to take steps to discontinue and/or to reduce the usurious withholding or find misfeasance or malfeasance by withholding more on a weekly basis than the CCPA permits.

At this juncture some of Respondents' acts have to be conscious and intentional in that the Ex-spouse must know she has received more than she is entitled for support and alimony, and Wickline, the DHS and the

Employer must all be charged with knowledge of the statutes they are consciously violating. Does a claimant have to prove governmental agencies and their employees must be aware of the language of the very statutes they are charged with enforcing?

This Court has held the right to enjoy property without unlawful deprivation, no less than the right to speak or right to travel, is in truth, a personal right, whether the property in question be pay checks, welfare checks, a home or a savings account. Lynch v. Household Finance Corp., 405 U.S. 538, 92 S.Ct. 111, 31 L.Ed.2d 424 (1972), reh. den. 406 U.S. 911, 92 S.Ct. 1611, 31 L.Ed.2d 822, on remand 360 F.Supp. 720. As a consequence when a significant portion of a persons's weekly pay check is garnished against his will under color of a

void administrative withholding directive issued in contravention of the very statute which authorizes it, Petitioner has no problem in establishing a prima facie case against all of the Respondents including his Employer. Follette v. Vitanza, supra, confirms that judgment creditors such as the Ex-spouse and nonimmune state employees who assist them (Wickline) who issue income executions or withholding directives are "State Actors" for 1983 purposes by virtue of the joint action test where the authority of a public official is invoked to compel a garnishee to withhold pay for a judgment debt.

In this case the Employer cannot deny knowledge on its part as to the invalidity of the administrative garnishment order as it was advised a number of times both in

writing and verbally to that effect by Petitioner and his counsel. Then, even if it could successfully plead ignorance on that score, how can the Employer evade scienter of the excessive amounts directed to be withheld by the DHS (of which it was aware and even advised Petitioner). Also how can it avoid responsibility for its intermittent withholding of much more than fifty-five percent of plaintiff's weekly wages in violation of the wage withholding sections of the FOEA, the West Virginia CCPA and the federal CCPA even after being advised of this impropriety by Petitioner and his counsel?

Improper garnishment, attachment and/or withholding procedures under state law constitute acting "under color of law" and when they are used to deny due process and

result in the illegal seizure of a citizen's property they become recognized areas of legitimate concern for 1983 actions such as the case sub judice. See Coltharp v. Cutler, 419 F.Supp. 924 (C.D. Utah 1976); McMeans v. Schwartz, 330 F.Supp. 1397 (S.D. Ala. 1971). Misuse of power by state officials such as Wickline in prosecuting the void administrative garnishment order (Brown v. Miller, 631 F.2d 408 [5th Cir. 1980]) is likewise a recognized basis for a 1983 action, as is concerted or joint action with state officials by private persons (Ex-spouse) who permitted the garnishments to continue and accepted the monies therefrom necessarily knowing the DHS/Wickline had oversuggested and that she was being overpaid. These facts when adduced at trial would clearly support a §1983 cause of

action. Dennis v. Sparks, 449 U.S. 24, 101 S.Ct. 183, 66 L.Ed.2d 185 (1980). See also McNally v. Pulitzer Pub. Co., 532 F.2d 69 (8th Cir. 1976), cert. den. 429 U.S. 855, 97 S.Ct. 150, 50 L.Ed.2d 131, holding that joint conduct by state and private persons is sufficient to support a finding that private parties are acting with state officials in unlawful conduct under color of law if the public and private parties act with a common understanding or a meeting of the minds. Grow v. Fisher, 523 F.2d 875 (7th Cir. 1975) holds that when private persons (Ex-spouse and Employer) engage in prohibited conduct with nonimmune state officials (Wickline), they are acting under color of law for purposes of 1983 actions.

One essential requirement of a 1983 action is that the defendants, at the time

they acted, knew or, as a reasonable person, should have known that such acts were ones that would deprive the Petitioner of his constitutional rights or might lead to that result. Bowens v. Knazze, 237 F.Supp. 826 (N.D. Ill. 1965). Some courts suggest one yardstick to be applied to governmental defendants is a "professional judgment" standard under which the government worker is legally responsible in 1983 actions where they exercised unprofessional judgment. Other courts apply what appears to be a higher "deliberate indifference" standard as to governmental employees in 1983 actions under which they are liable only if the actor failed to provide adequate protection and was recklessly indifferent or grossly negligent, if not actually deliberately or intentionally indifferent regarding a

citizen's rights. Shaw by Strain v. Stackhouse, 920 F.2d 1135 (3rd. Cir. 1990). It would be helpful if this Court "standardized" the test which should be applied in such instances but the quintessence of either standard appears to be recklessness by a state actor which triggers the protections of due process for the purposes of 1983 actions (Gregory v. City of Rogers, Ark., 921 F.2d 750 [8th Cir. 1990]).

In the case at bar the reckless, deliberate and indifferent acts of Wickline and the DHS as to Petitioner's rights are glaringly present, and regardless of which standard is followed these actors should be held accountable, Wickline in money damages and both by prospective injunctive relief. When the District Court ruled below it was not aware of the blatant and continuing

practices of Wickline and DHS personnel in ignoring Petitioner and other obligor's hearing rights when they personally feel there is no sufficient mistake of fact as Wickline's deposition glaringly reveals. That deposition was taken a few weeks before the District Court decision and under local Court Rules such depositions are not filed with the Court unless brought to the Court's attention by counsel.

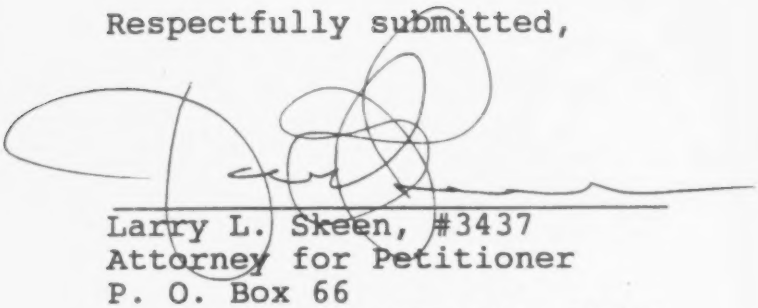
Conclusion

Based upon the authorities and argument above Petitioner submits: the West Virginia Family Law Master system is unconstitutional as improperly wresting from West Virginia constitutional circuit courts the domestic relations cases over which they have by our State Constitution the sole and exclusive authority and duty to judge; Mathews v.

Eldridge controls the present controversy and when the various rights are balanced as that case directs your Petitioner does or did have the right of due process and of an entitlement hearing before his wages were withheld (garnished) which right was denied; Petitioner was not afforded procedural due process as he was denied a hearing although requested before the withholding commenced and the withholding directives implemented against him and his employer did not meet or contain the language requirements which the various federal courts discussed in that section deem necessary in order to afford procedural due process; Petitioner made out a prima facie case against all or some respondents for prospective or injunctive relief and made out a prima facie claim, at least against the Ex-Spouse, Wickline and

the Employer, for monetary relief if the Fourth Circuit would have applied Hafer v. Melo which it did not; and finally the District and Fourth Circuit should have retained jurisdiction of Petitioner's claim for respondents' violation of the maximums amounts that could be taken from his wages under both the Federal and State Consumer Credit Protection Acts. Petitioner therefore requests this Court to declare the Enforcement of Family Obligations Act or the portions thereof argued above as unconstitutional and lacking both substantive and procedural due process, to enjoin the further application of such laws and to reverse the District and Fourth Circuit Courts remanding this matter back with appropriate directions.

Respectfully submitted,



Larry L. Skeen, #3437
Attorney for Petitioner
P. O. Box 66
Ripley, West Virginia 25271
(304) 372-3061

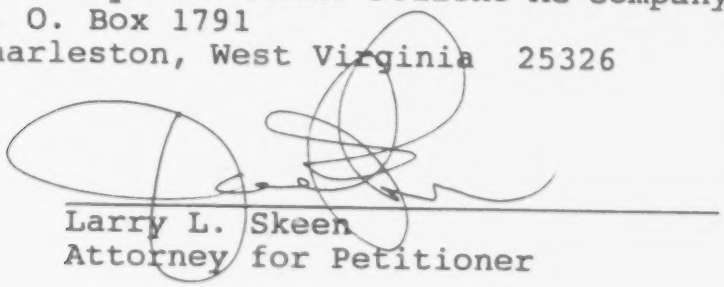
Certificate of Service

In accordance with Rule 28 of the Rules of the United States Supreme Court, I hereby certify that I have this 16th day of March, 1992 filed the required copies of the brief in the Clerk's office and have mailed the required copies of the brief to:

Ann L. Haight
Attorney for Judith Annette Roush
Post Office Box 2931
Charleston, West Virginia 25327

W. Randolph Fife & Daniel Schuda
Attorneys for Betty Wickline and State of West Virginia Acting Through Its Department of Human Services
P. O. Box 1588
Charleston, West Virginia 25326

Michael Victorson & Christopher Power
Attorneys for Rhone-Poulenc AG Company
P. O. Box 1791
Charleston, West Virginia 25326



Larry L. Skeen
Attorney for Petitioner